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Judicial Protection of Minority Groups Under the Weimar Republic

BY EDWIN M. SIERADZ*

The story of the German Weimar Republic is of more than academic interest to Americans. Wilson's fourteen points rang in the momentous event of its birth, and with its open or veiled overthrow, that chain of hectic events began which finally saw America's entry in World War II.

For the American lawyer especially, Germany under the Weimar Constitution offers a great deal of interest. Some of its achievements, for example, its system of social security and its compulsory arbitration of labor disputes, might justify closer study with an eye to "getting a few points." In other respects the history of the Weimar Republic is an account of total failure; but even then worthwhile knowing, if only to make us see its shortcomings so that we may avoid similar blunders.

It is the purpose of this paper to record the history of one such failure, the inability of judicial machinery to protect loyal democratic groups within Germany against aggression by ribald and pugnacious law violators. Some conclusions to be drawn from this tragic failure are of immediate interest to us. A few examples will illustrate the type of controversy involved.

In the book of a professed "military expert" it was charged that the Freemasons were guilty of the German defeat in 1918. In great detail and with much "documentary evidence," the author asserted that

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one Lieutenant Henschke, under orders of the Freemasons, suppressed an order given to him by his commander for delivery to another army unit, and that this breach of duty caused that fateful gap in the Marne front which finally enabled the Allies to break through in 1918.

Or the *Stuermer* (Stormer), that disgrace to all newspapers, might falsely disclose to the world that a certain Catholic statesman, just back from Rome, went there to get the Pope's orders on how to run Germany, and that he had vowed to act *in maiorem papae gloriam* only, with utter disregard of German interests.

Or the *Schwarze Korps*, the paper of Hitler's Elite Guard, would hire an unscrupulous physicist to "prove" that Einstein's theory of relativity was nothing but a particularly vicious Jewish attempt to confuse German minds, and then to utilize the general disorder to gain domination of Germany.

What were the possibilities given by the law to deal with such odious vilifications?

Generally speaking, there were three ways: police action (which, however, was limited by the "act protecting the freedom of the press"), a civil action by the aggrieved party, or criminal prosecution.

Under the famous Section 10, Part 2, Title 17, of the *Preussisches Allgemeines Landrecht* (General Statutes for the Prussian States), which dates back to Frederick the Great, and under other provisions similar in scope, the police had the right to act whenever and however necessary to preserve public safety and good order. Ordinarily it could address itself only to the one responsible *(der stoerer)* for a disturbance. This provision, it would seem, was broad enough to give the police appropriate authority to intercede in almost any case of public disturbances, and in many respects it was liberally construed. But the *Borkumlied* (Borkum song) case is a good example of what the highest Prussian court in the field of administrative law did to that good old statute when it came to the protection of a group.

The inhabitants and guests in the summer resort Borkum had somehow contracted the habit of singing a vile text to the tune of a German folksong, harmless in itself. The substituted words openly advocated violence against certain groups within the German population. The song came to be known all over Germany in this deteriorated form as the *Borkumlied*. In fact, practically no one, including this writer, could

remember the original words. The local band, to please its rowdy listeners, closed every concert by playing this infamous song, knowing, of course, full well that the audience would lustily blare the obnoxious text. The court reversed an order of the local police prohibiting the band from playing the tune because, it said, not the band, but the crowd were the ones who caused the disturbance. The tune, it opined, was all right. Was it the band's fault that the audience used it as a basis for unlawful utterances?

Well, I think it was, and many outstanding German jurists thought so, too.

It was in the field of criminal prosecution where the shortcomings of court action as a means in the fight against group discrimination were most pronounced. This was not the fault of the law itself, which was, before court interpretation narrowed its scope, inclusive enough to give adequate protection, as the following survey will show.

Where a person made derogatory statements of fact or of opinion to the aggrieved party himself or to third persons, he was criminally liable for a *Beleidigung*, which crime is broader than the common law "criminal libel," inasmuch as it includes opinions and unpublished statements regardless of whether oral or written.[1] The weakness of these broad prohibitions, as far as group protection was concerned, was that, according to the German Supreme Court, they did not apply to the libeling of a group as such. A man could therefore insult "the Jews," "the Catholics" or, as was done frequently, "the German judges" without fear of criminal responsibility. It was only where the defamatory remark imputed a derogation of individuals that the sanction of the law could be invoked. The decisions holding one way or the other can hardly be reconciled. It has, for example, been consistently held that derogation of "the German judges" or "the Jews" was group defamation and, therefore, not within the protection of the defamation laws. On the other hand, a man has been penalized for saying that "all German World War Corporals were Himmelstosse," referring to the repulsive character of Corporal Himmelstoss in Remarque's well known novel, *All Quiet on the Western Front.*

I do not see on what sound distinction this difference in the results can be based.

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[1]PENAL CODE, Sec. 185, *et seq.*

The preaching of group hatred would often violate Section 130 of the German Criminal Code, which made it a criminal offense to "incite violence in a manner dangerous to the public peace." This section was being vigorously applied under the Kaiser, against any reformer or social-democrat who made statements even faintly approaching a suggestion of violence. But the courts were strangely reluctant to apply it in any effective way when reactionaries urged to "kill the November criminals" (i. e., the leaders of the German revolution in 1918), or to "kill the Jews."

This writer was present, working as an "intern" in the District Attorney's office, at a trial against certain adolescents who had been indicted for shouting "kill the black pigs," meaning the Catholic Zentrum Party, and "kill the Jews." The case against those accused seemed as clear as possible. But the court acquitted the defendants for "lack of evidence" that the individuals before the court had participated in the shouting. Now the defendants had admitted that they were members of the group which had united for just the purpose of such unlawful demonstration, and to anyone familiar with conditions then prevailing in Germany, including the judge, it was a perfectly absurd idea that just these boys should have kept their mouths shut while everyone else around them was roaring.

When "God" or any essential institution of an incorporated religious community were attacked, the offender might have been criminally liable for "publicly blaspheming God with offensive expressions."[2] But this statutory provision was no more effective than were the ones to which we have previously referred.

It is almost impossible to give even a vague idea of the vile denunciations of especially the Jewish and Catholic faiths which were commonplace in such books as those of the Nazi "philosopher" Rosenberg, *The Myth of the 20th Century,* or in the outright pornographic *Pfaffenspiegel* (Parsons' mirror). No sound imagination would be fertile enough to invent such stories as there "reported," ranging all the way from Catholic conspiracies to rape any and all female confessors, to Jewish ritual murders.

But convictions for such flagrant law violations were not frequent, and the penalties exacted were too light to serve as a deterrent.

[2]PENAL CODE, Sec. 166.

Since many of the active foes of the Weimar Republic also were apostles of group hatred, the "Act for the Protection of the Republic," enacted in 1922 after Rathenau's assassination, could and did for a while effectively, though indirectly, serve as a basis to protect group rights. Among its provisions was one making the slandering of deceased German statesmen a criminal offense.[3] This innovation had become necessary because those violent rabble rousers used to smear in a perfectly incommunicable manner the memory of certain republican statesmen. One of their pet hates was Erzberger, Catholic secretary of the treasury, assassinated in 1921. Their technique was to use the fabricated misdeeds of those defenseless men as a means of inciting hatred against the groups of which they were members, and thereby undermine the republic which those groups supported.

For a while this act served adequately to protect the republic, and the groups supporting it, against the specific type of slander or violence banned by the act. But here again an interesting case of "wearing off" is to be noted. The courts again began their corrosive work, and after a while it was possible to call the Weimar Republic the "Jewish Republic" without running counter to the law. Such designation, clearly intended to discredit the Weimar Republic in the eyes of the reactionaries, was held ordinarily not to constitute a defamation of the republic within the meaning the statute.

It is only fair to note that the fiasco of group protection by criminal or police action was not experienced when group protection by a *civil* action for injunctional relief was sought. When a businessman tried to improve his fortune by advertising that he owned the "only German store in town," or when he urged not to buy from a competitor because of the latter's group affiliation, the courts would enjoin such action on the authority of Section 826 of the Civil Code (the German version of the Roman *Actio doli)*, or under the "act prohibiting unfair competition." It is, indeed, a claim to glory of the German Supreme Court that as late as 1938, five years after Hitler's accession to power, it dared declare such a business practice unlawful. And it does not detract from this exhibition of courage that the party prevailing in that suit could hardly make use of its judgment, for the simple reason that the sovereign Ges-

[3]Sec. 5. No. 3.

tapo, unperturbed by such legalistic whimsicalities, could and would not allow the victor to stand on his documented right.

These examples naturally raise the question of how this over-all fiasco of group protection by court procedure can be explained in a nation which produced jurists of such international renown as Savigny, Ihering, Gierke, Liszt, to name only a few? And also, can a lesson be learned from this failure for the United States citizens in their fight for civil liberties and human decency?

The answer is not a simple yes or no; it is complex, as is the problem involved. But a few conclusions may be securely drawn.

The failure of group protection under the Weimar Constitution was partly due to conditions peculiarly German, which would not be encountered in this country if we were to try to fight group discrimination by concerted court action. Here are some of them:

The Weimar Republic inherited almost *in toto* the reactionary judiciary and executive officers of the monarchy. Those men, in their outspoken or unconscious antagonism to the republic, were naturally disinclined to give force to the laws directed at the protection of the republic or of the groups supporting it. As many of these groups seeking court action had been denied their full measure of civil rights under the monarchy (e. g., the "Order of the Jesuits," the "Social-democrats," and factually, though not in law, the Jews), and were given full equality under the republic, the judges considered questions of group rights a political rather than a legal controversy. They, therefore, were reluctant to brand a man a criminal and throw him into jail for what appeared to them a disputable political credo rather than a criminal act.

Another peculiarly German feature telling against judicial effectiveness in the fight against group discrimination were the frequent general pardons granted under the Weimar Republic. A convicted law breaker had an excellent chance never to serve his term nor to pay his fine. These amnesties naturally deprived a conviction of whatever deterrent effect it might have otherwise had.

Another frequently employed means to beat the law was to make a member of parliament the so-called "responsible editor" of a newspaper bent on Jew-baiting or dissemination of other group hatred. Under the screen of the editor's parliamentary immunity, the paper could lustily violate every law on the books without having to worry about criminal liability.

The number of lawbreakers who in one way or another managed to keep out of prison is legion. Among them are Joseph Goebbels, then editor of the *Angriff* (Attack), and Streicher, editor of the wildest pornographic sheet imaginable. Notwithstanding numerous flagrant breaches of the law and even occasional convictions, they never had to serve a term.

While the circumstances just stated, telling against effective court action, were peculiarly German and would not necessarily be encountered if in this country concerted court proceedings were tried as a means to fight group discrimination, there is at least one additional weakness in such a course which is inherent to it and can hardly be eliminated anywhere.

The conviction of the rabble rouser, far from discrediting him in the eyes of his followers or in those of most of the indifferent, gives him the halo of martyrdom and thereby aids rather than harms his cause. The publicity given him by the court trial, frequently swelled by newspaper reports, works in the same undesirable direction. Further, American courts might be as reluctant as the German to convict a man as a criminal for acts which, abhorred by the courts though they might be, in most cases touched a sensitive area of political controversialness.

The conclusion then, to be arrived at on the basis of the foregoing, is that court action must remain an exceptional means in the fight against group incrimination and discrimination, because the problems involved are political and educational in nature rather than justiciable.

I cannot close without citing the most glowing example of such constructive group defense known to this writer.

In or about 1935, the Catholic bishops of Germany set out to answer some of the assaults made on the church, especially those contained in the Nazi High Priest Rosenberg's book, *The Myth of the 20th Century*. At a time when such an act might have meant death, this body published a remarkable booklet, tearing apart those inane accusations with truly masterly scholarliness, with admirable clarity, in a style which only the self-assuredness gained from centuries of victorious survival can give. I do not believe that anyone who reads this pamphlet could ever again fall for the cheap trash of the Streicher, Rosenberg and other Nazi apostles.

Private Industry Must Plan for Post-War Era

American private industry must make plans for its operations in the approaching post-war world. Lawyers can perform a valuable service in this planning "by reanalyzing both the laws which governed private business in pre-war days and the new governmental economic controls put in force since Pearl Harbor." Donald S. Frey, New York attorney, expresses this opinion in the current issue of the American Bar Association Journal.

"The legal profession as a whole, by studying each client's specific operations in the light of national experience with peace and wartime trade regulations, and also in the light of expressed post-war aims of our political leaders, can make its greatest contribution toward a just and durable peace," Mr. Frey continued.

In addition to the prospect of profit, the basic aim of private industry is to create better living standards, he adds. The basic aim of government is to maintain the present system of free competition as a means for improving living standards.

"Some of the wartime governmental restrictions may be continued after the war as a necessary part of free competition," Mr. Frey points out. "If the United Nations are victorious, similar controls in foreign commerce may be established. Price ceilings will remain on scarce commodities until competition is again in a position to control prices."

This New York attorney further states that as a peacetime control a policy of full employment of the people at all times may be adopted. The problem, he says, will then be to produce enough goods and services to absorb the income earned as a result of full employment.

"In foreign commerce, free competition will provide a satisfactory beginning for an economic internationalism, which is just as essential for an enduring peace as a political internationalism," Mr. Frey believes. "Lawyers must clarify the rights and duties of all individuals, special groups and nations which will result from the establishment of the free competitive system throughout the whole world. By so doing, they will further a system of government not by men, but a government by laws enacted for the majority, but with safeguards for all minorities."

"Ethics" Forbid Disclosures of Judicial Malfeasance

BY FRANK SWANCARA*

Since 1924 the Supreme Court of Colorado has recommended the Code of Ethics as adopted by the American Bar Association in 1908. The first canon concludes with these two sentences:

> "Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the *proper authorities.* In such cases, *but not otherwise,* such charges should be encouraged and the person making them should be *protected.*"

This means that a lawyer will not be "protected" but may be disbarred for criticism if the "serious complaint" is made known to the people, they not being the "proper authorities," and the disclosure will be deemed, according to the authorities, not a lesser but an aggravated misconduct if the facts are truthfully alleged in the grievances or comment. So construed, the code is consistent with what the courts themselves have said and done. At the beginning they were influenced by, and conformed to, the old law of libel, under which truth was not a justification for language imputing malfeasance to public officials. "The doctrine * * * came from the court of Star Chamber."[1] When it became recognized as part of the common law, it was defended on the theory "that truth may be as dangerous to society as falsehood, when exhibited in a way calculated to disturb the public tranquility, or to excite to a breach of the peace."[1] Consequently most of our "colonial courts, like the courts of England, were willing tools in the hands of the executive to crush all criticism of the government."[2]

When courts usurped the power to punish as for contempt any adverse comment on their conduct tending to create popular disapproval of what had been officially done, they appropriated and applied the same doctrine, and so in contempt cases the rule was, and still is, that "it is entirely immaterial whether the matter published is true or false."[3] That was logical, for if courts needed protection against charges of malfeasance, true ones would be more harmful than the false. The next step was to apply the same rule in disbarment proceedings, so that there, too, evi-

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*Of the Denver bar.

[1]People v. Croswell, 3 Johnson's Cases (N. Y.) 326, 3 Wheeler's Crim. R. 330 (1804).

[2]Mr. Justice H. P. Burke, *Uncle Sam's Business,* 30 Colo. Bar Assn. Rep. 120, 126 (1927).

[3]People v. News-Times Pub. Co., 35 Colo. 253, 84 Pac. 912 (1905).

dence of the truth would be excluded, where the proceedings were based on a lawyer's criticism of a judge. Publications which would be constructive contempt if made by a layman, were proof of "misconduct" if made by a lawyer,[4] and it was enough to constitute "misconduct" if the irritated judge saw fit to brand the comment as such.[5]

Courts did not, and could not, publicly admit that truth is no defense in disbarments for comment, for to do so would also admit that it is possible for judges to be as bad as charged by the respondent. Accordingly it became convenient to "find" that the critic's charges were "false." But in at least one case[6] it was frankly declared that if serious charges were "established" they would be attended with "the gravest results," meaning that to expose one arbitrary judge would create public distrust of all others. The opinion would permit, but did not encourage, the making of complaints "in the manner provided by law," that is, an appeal to the legislature to exercise its power of impeachment.

An opinion of the Supreme Court of Ohio makes it clear that what is meant by "the proper authorities," as used in our code of ethics, to whom alone may the lawyer disclose his "complaint," especially of an appellate judge, are the legislators who have the power to remove judges by impeachment. After quoting the first canon of our ethics, the court said:[7]

> "If the judges who were attacked in these circulars were believed by the respondent to be guilty as he charges and insinuates, it was his privilege and duty to do what he could to have them impeached, so that they might be deposed from office, when found guilty."

In defending that theory of duty, the Supreme Court of Arkansas said that in an impeachment trial the conduct of the judge "may undergo a full investigation."[8] but gave no assurance that a trial could be obtained. In the Ohio case the lawyer's criticisms related to conduct during terms that were then about to expire, and if he had gone to the next legislature he would have been confronted with the authorities holding "that an officer cannot be removed from office for an act committed during a prior term."[9]

Rarely, if ever, is there a judicial offense bad enough to justify impeachment, but frequently it deserves such criticism as could be, arbi-

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[4]State v. McClaugherty, 33 W. Va. 250, 10 S. E. 407 (1889).
[5]See opinion of trial court in Austin's Case, 5 Rawle (Pa.) 191, 200 (1835).
[6]*In re* Murray, 58 Hun 604, 11 N. Y. S. 336 (1890) quoted, *In re* Knight, 34 N. Y. S. (2d) 810, 814 (1942).
[7]*In re* Thatcher, 80 Ohio St. 492, 89 N. E. 39 (1909).
[8]State v. Morrill, 16 Ark. 384, 403 (1855).
[9]Note, Ann. Cas. 1916B 708.

trarily, held "contemptuous" and a cause for disbarment. If in any case "grievances" were submitted to a legislature, the charges would likely be ignored or ridiculed, and if considered at all, dismissed in pretended conformity to the judge-made law that even before an impeaching body "serious" charges should not be "entertained for a moment, except upon the most impressive evidence at least."[10] Evidence would not likely be "impressive" to legislators politically affiliated with the judge.

While a clergyman,[11] an editor,[12] a labor leader,[13] or any other citizen who is not a member of the bar can freely give information and opinion on the demerits of a judge, and defend himself against a "scandalous, scurrilous, and defamatory" court opinion,[14] the professional code of ethics denies the same right to the attorney, a citizen better informed. To enforce that code, courts have disbarred lawyers for arguments used in opposing judicial candidates for re-election. The judges professed that they "thoroughly considered the authorities,"[15] and followed them, but the "authorities" were no more imperative there than in the recent contempt cases which reject them.

The Code of Ethics formulated and adopted by the American Bar Association was based on the 1887 code of the Alabama Bar Association,[16] but the latter code did not contain the last two sentences of what is now our first canon. Instead it provided, in substance, that "attorneys should, as a rule, refrain from published criticism of judicial conduct." That was also the provision of the code published by the Colorado Bar Association in 1899.

The American Bar Association's committee on ethics in 1907 recommended that Chief Justice Sharswood's *Professional Ethics* be reprinted, as it later was, as a volume of the American Bar Association Reports, but the association and its committee thereafter went contrary to Sharswood's doctrine on the right to criticize the conduct of *elective* judges. When that great Chief Justice of the Supreme Court of Pennsylvania had occasion to speak officially on that subject, he did not attempt to muzzle the bar by any language resembling our first canon of ethics, but after referring to the fact that at the time of some earlier decisions on misconduct the judges were appointed for life, declared that since "the

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[10]*In re* Murray, *supra* note 6.

[11]Lauder v. Jones, 13 N. D. 535, 101 N. W. 907 (suggesting absence of any proceeding against the clergyman who wrote the affidavit involved).

[12]Nixon v. State, 207 Ind. 426, 193 N. E. 591, 97 A. L. R. 894 (1935).

[13]Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L. ed. 192 (1941).

[14]Nadeau v. Texas Co., 104 Mont. 558, 69 P. (2d) 593 (1937), showing the possibility of such opinions.

[15]*In re* Humphrey, 174 Cal. 290, 163 Pac. 60 (1917), following *In re* Thatcher, *supra* note 7.

[16]31 A. B. A. Rep. (1907).

case is altered * * * it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship."[17] Now that laymen may freely speak, it is timely to note that the Chief Justice also said:

> "No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar."

One disbarring court[18] in refusing to follow Chief Justice Sharswood's opinion declared that his holding was compelled by a clause in the Pennsylvania bill of rights relating to prosecutions for libel, but that cannot be true because the reasoning and the result was obviously based on the fact that the people elect the judges. Mr. Justice Steele of the Supreme Court of Colorado, and Mr. Justice Field of the United States Supreme Court, saw and quoted with approval[19] what had been said by Chief Justice Sharswood on the right and duty of a lawyer to give information and opinion to people who would hear, instead of appealing solely to a deaf and indifferent legislature. In a recent Tennessee case,[20] the Sharswood opinion was again approved, and as if repudiating the two muzzling sentences in the first canon of our ethics, the court quoted all of that canon *except* such sentences.

The Colorado Bar Association's canon No. 2 discouraged "published criticism" by those "who have been of counsel" in the cases involved, but only such counsel know the facts, and if silenced, others lack the information upon which to speak. Yet, then as now, if informed counsel assail improper judicial acts, they are in danger of being, in published disbarring opinions, perpetually libeled as libelers peeved by losing in a litigious gamble.

The first canon of our ethics, requiring that complaints be made, if at all, only to impeaching "authorities," silences not only the attorney knowing the grievances of a litigant but also the man who in self-defense intends to write a candid autobiography, "confident in his own soul that he had done no wrong."[21]

If continued disbarment for conviction of a statutory offense would cause "a lesser Burns * * * to conceive a greater line than 'Man's inhumanity to man'",[22] a suspension for justifiable comment would prove

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[17]*Ex parte* Steinman, 95 Pa. St. 220 (1880).

[18]State v. McClaugherty, *supra* note 4.

[19]People v. News-Times Pub. Co., *supra* note 3; *Ex parte* Wall, 107 U. S. 265, 309, 2 S. Ct. 569, 27 L. ed. 552 (1882).

[20]*In re* Hickey, 149 Tenn. 344, 258 S. W. 417 (1924).

[21]See Hilliard, J., in People v. Lindsey, 93 Colo. 41, 23 P. (2d) 118 (1933).

[22]Hilliard, J., in People v. Laska, 109 Colo. 389, 126 P. (2d) 500 (1942).

its verity. Only Shelley, another poet, dared to denounce Lord Ellenborough for his oppression of Daniel Isaac Eaton. The ethical bar was silent, as it was when Lord Hale condemned "witches" to death.

For a long time it was criminal libel to tell the truth about a tyrannical executive, but constitutions came to make the truth a defense in prosecutions for libel.[23] If truth about a corrupt judge was told by a layman, it was contempt; if told by a lawyer it was not only contempt but also "misconduct" which was punished by disbarment. In 1882 Mr. Justice Field wrote:[24]

> "The power to punish for contempt * * * was formerly so often abused for the purpose of gratifying personal dislikes, as to cause general complaint, and lead to legislation defining the power and designating the cases in which it might be exercised."

But the power to punish comment as "misconduct" remains,[25] reminding that Mr. Justice Field also said:[24]

> "Doctrines are sometimes advanced upholding the most arbitrary power in the courts, utterly inconsistent with any manly independence of the bar."

Free speech for the citizen outside the bar, with respect to judicial conduct, is upheld by the highest court of the land,[26] and by many state courts.[27] But "ethics" still withhold that liberty from the lawyer, and to conform, he must remain the same silenced serf as his precursor was. In 1835 nearly all the lawyers of a county were disbarred for writing that "the public confidence seems to be withdrawn * * * from the court."[28] Mr. Justice Field also wrote:[29]

> "Under our institutions arbitrary power over another's lawful pursuits * * * is odious wherever exhibited, and nowhere does it appear more so than when exercised by a judicial officer toward a member of the bar practicing before him."

It may be that gangsters have ethics requiring machine gun assassination of any member who disrespectfully reveals the conduct of the Little Caesar whose "judicial discretion" permitted the membership, but they do not publish that code nor offer it as proof that theirs is an "honorable profession."

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[23]Note, 21 L. R. A. 509.
[24]*Ex parte* Wall, 107 U. S. 265, 302, 2 S. Ct. 569, 27 L. ed. 552 (1882).
[25]State v. McClaugherty, *supra* note 4.
[26]Bridges v. California, *supra* note 13.
[27]Nixon v. State, 207 Ind. 426, 193 N. E. 591, 97 A. L. R. 894 (1935).
[28]Austin's Case, 5 Rawle (Pa.) 192 (1835).
[29]*Supra* note 24.

Alien Property Custodian Tightens Control Over Transfer of Property to Persons in Enemy Territory

Leo T. Crowley, Alien Property Custodian, has issued a regulation known as General Order No. 20, which prohibits any payment, transfer or distribution of property in the process of administration by a person under judicial supervision or involved in any court or administrative action or proceeding, to or for the benefit of any person in any place under the control of an enemy country.

Executive Order No. 9095, as amended by Executive Order No. 9193, July 6, 1942, authorizes the Alien Property Custodian, under Section 2 (f) thereof, to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest with respect to any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation, or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof; and in Section 5, to issue appropriate regulations governing the service of process or notice upon any person within any designated enemy country or any enemy-occupied territory in connection with any court or administrative action or proceeding within the United States. The Alien Property Custodian also is authorized to take such other and further measures in connection with representing any such person in any such action or proceeding as in his judgment and discretion is or may be in the interest of the United States.

General Order No. 5, issued on August 3, 1942, requires persons or officers acting under judicial supervision, or in any court or administrative action or proceeding, or in partition, libel, or condemnation, or other similar proceedings, to file with the Alien Property Custodian, Form APC-3 covering the interests of persons in any enemy country or enemy-occupied territory in such proceedings

General Order No. 6, dated August 3, 1942, provides that where, in any court or administrative action or proceeding within the United States, service of process or notice is required to be made upon a person in any enemy country or enemy-occupied territory, a copy of such process or notice shall be sent by registered mail to the Alien Property Custo-

dian at Washington, D. C. The Alien Property Custodian may within sixty days file a written acceptance of said service or refuse to accept the same, as in his judgment or discretion may be in the interest of the United States.

The purpose of General Order No. 20 is to postpone payment, transfer, or distribution of property in certain court or administrative actions or proceedings in the United States, as above described, until the Alien Property Custodian has made a determination with respect to the action to be taken therein.

To accomplish this purpose General Order No. 20 provides, in effect, that no payment, transfer or distribution of property which is in the process of administration or which is involved in any action or proceeding may be made to or for the benefit of any person within an enemy or enemy-occupied country, unless the Custodian either (1) has consented thereto, or (2) has filed a statement that he does not desire to represent such person, or (3) has appeared in the proceedings on behalf of such person and has been given ninety days prior notice of the proposed payment, transfer or distribution. The Custodian will act in each case as the facts and circumstances of that particular case demand.

Generally, in those cases in which the Custodian determines not to represent such persons, the Custodian will disclaim his interest in any proposed payment, transfer or distribution by filing with the court or agency in which the proceeding is pending a written statement that he has determined not to represent the person to whom distribution is proposed to be made. However, if the procedure and circumstances demand, the Custodian, in lieu of filing such statement, will issue a written consent to the proposed distribution.

The Custodian will also avail himself of the procedure of filing a written consent in those cases where he has appeared in the proceedings and desires to permit distribution prior to the expiration of the ninety-day period provided for.

Upon the issuance of a proper disclaimer in the manner specified in this General Order No. 20, or in those cases where the Custodian has appeared and the written notice of the proposed payment, transfer or distribution has been given to him, and ninety days have expired without the exercise of any power or authority by the Custodian with respect to such property, the proposed payment, transfer or distribution may be effected; provided, however, that such payment is licensed or otherwise authorized by the Secretary of the Treasury pursuant to the provisions of Executive Order No. 8389, as amended.

DICTA

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Army Adopts Colorado Bar Plan for Legal Aid to Military Personnel

Chief of Staff G. C. Marshall announced that the War Department and the American Bar Association have agreed to sponsor jointly a plan to make adequate legal advice and assistance available throughout the military establishment to military personnel in the conduct of their personal affairs.

Genesis of the plan originated at the Lowry Field Post when the Colorado Bar Association's War Committee, under the able chairmanship of John L. Zanoni, originated free legal service to men in the armed forces. The Lowry Field plan was approved first by the Area Corps Commander and has since been adopted, with some modifications, by the War Department. When George M. Morris, President of the American Bar Association, was in Colorado, he explored the Colorado bar plan and stated that it was the most feasible and workable in the country. As a result of his efforts, coupled with those of the state association, the plan is now in effect in the entire country.

The service is to be gratuitous and will be rendered by volunteer civilian lawyers and by lawyers who are in military service. General Marshall's circular states that such gratuitous legal advice "should not be considered as charity but entirely as a service of the same nature as

medical, welfare, or other similar services provided for military personnel." He also adds that in any proper case the legal assistance office may refer the serviceman to civilian counsel for retention upon the usual civilian basis.

The general organization and direction of the plan have been assigned to the Judge Advocate General, who will collaborate with the Committee on War Work of the American Bar Association. Similarly, the staff judge advocates of the various service commands will collaborate with the committees on war work of the several state bar associations within their respective service commands. Legal assistance offices are to be opened at each post, camp and station within the United States, and offices will also be established overseas with such modifications as may be necessary to meet local conditions.

Each legal assistance office will, as far as practicable, be composed of such military personnel as may be assigned to it, and such volunteer civilian lawyers as may be designated by the appropriate state bar association's committee on war work. The legal assistance officer must be a licensed attorney at law (apparently not required to be licensed in the particular state where the camp is located). However, in the few cases where lawyers in the armed forces are not available, suitable officers may act temporarily, but may not give legal advice and counsel.

The usual attorney and client relationship is to be maintained and all matters are to be considered as confidential and privileged. "Strict observance of this rule is essential to the proper working of the office in order to establish confidence in its integrity and to assure all military personnel regardless of grade or position that they may disclose frankly and completely all material facts of the case to the office personnel without fear that such confidences will be disclosed or used against them in any way." The military personnel at the office will not appear before civil courts, boards, or commissions as attorneys for persons using the facilities of the office.

The new service is to be made available only to military personnel and their dependents, "and this will include all members of, and persons serving with the armed forces of the United States, including Army nurses, members of the Women's Army Auxiliary Corps, and civilian employees actually employed and residing on the military reservation served by the office or employed at an overseas installation."

The Colorado Bar Lawyers War Emergency Committee, under the chairmanship of Ben E. Sweet of Denver, has appointed a statewide committee with lawyers in every county to act in furtherance of this plan. Each state in this army corps area is likewise appointing such statewide committees.

Excerpts from Claim Files

Contributed by RONALD V. YEGGE*

He hit me head-on going 60 miles per hour damaging my fender for about $3.00.

I was seriously hurt and I don't think I will be able to work again, but if you will send me check for $10 to cover my damage I will settle.

Enclosed is bill for $8.00 to my car. I want to be fair and that is all I want, but if you don't pay I will sue for mitigated damage.

I heard that he drinks all the time and has killed three people last week.

I did not contribute any negligence to the accident and as I did not know the accident was going to happen 'cause I was asleep. Please send me my damages.

I wish now that I had hired a lawyer before you decided I was negligent.

A head-on collision occurred in a narrow canyon in the mountains. The assured reported the accident, giving very meager details. The claimant sent in a bill for repairs. To complete the file a letter was addressed to the claimant requesting that he give the width of the road and other facts. The following correspondence was exchanged:

Claimant:

"I don't know how wide the road is, and be damned if I am going up there again to measure it, because that guy has run into me four times already, and I'm not going to let him run into me again."

Copy of this letter was sent to the assured, with an inquiry as to the accuracy of the information contained in the letter. The assured wrote as follows:

"He is a damn liar. I have only run into him three times."

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*Of the Denver bar.

My wife became pregnant as a result of the accident and is going to have a miscarriage. Unless my claim is settled at once I will be forced to blame it onto you.

I will not fool around in a small court, but will take you to the Supreme Court immediately.

It is true that the accident was both our faults, but I don't see what that has to do with my case.

Answer to subrogation demand: "If you think you can get any money out of me just come up here and try it."

He shot out of the alley without warning and rammed his front end into my body in the middle.

I am sorry that my son didn't lose his whole leg so that you would get stuck more damages.

Our judge here says that he will see to it that I get plenty of damages if I have to file suit.

My husband has lost his man power as a result of the accident and I have had to get a man to take care of things that have to be done.

He admitted to me right before it happened that it was all his fault.

I am pleased to write you that my best cow was killed by your car.

We have a way to deal with people who steal or kill cattle and then try and get out of it.

She and I came together on a lonely side road and there was no one to pull us apart, so I was forced to go off and leave her there.

I and him decided both our insurance policies would fix the cars and we ain't goin' back on our agreement.

Comprehensive loss report: "My lady friend put her foot through the glass in rear door, breaking it."

Extract from letter from Abraham _____: "She hurt my brother badly. She is charged by the policemen with reckless driving and taking the right-of-way from a presbiterean."

I saw my lawyer and he said that I was at fault but if I wrote you and insisted on my damage that you would pay his fee of $5.00. Please send it immediately.

Nobody pays attention to the law here anyway, so I ain't going to let you tell me what the law is.

He killed my wife but I don't care as long as they don't cause me no trouble.

I slipped on the ice and sat down in a rush.

He has a reputation for backing out of his garage at unexceedable speeds.

Thank you for the check. It has relieved our pain and damages a lot.

Before making an estimate the garage man wants to know if you are going to check the damage.

Wire to insurance company representative 150 miles away: HAD ACCIDENT SEND ADJUSTER AT ONCE.

Result: Damage, bent fender, $3.50
Expense of sending adjuster, $40.00

You ain't foolin' with no hicks. If you don't pay, my attorney, who is as mean as a hungry wolf, will be unleashed.

I have taken secret depositions that will be sprung on you in court.

He outsmarted me and gave me a drink so that I couldn't smell liquor on his breath.

Federal Judge Advocates Intelligence Test for Jurors

Intelligence tests or some other method to weed out prospective jurors who are unable to understand the complexities of civil trials are suggested by Federal District Judge Clarence G. Galston of Brooklyn, N. Y., in an article in the April issue of the AMERICAN BAR ASSOCIATION JOURNAL.

Judge Galston refers to the fact that jurors serve as a "balance wheel in the administration of justice." The judge continues:

> "There is no rational or experiential ground which justifies the belief that a jury is natively endowed with qualifications requisite to efficient performance of its duties. We make no such assumption in respect to lawyers, judges, doctors, ministers, engineers, or of any others who follow professional or specialized vocations. Whenever there is competent performance in any field of human endeavor, we usually find training and education. Thus jurors are no more heaven sent than are the other groups participating in the trial of a law suit."

Judge Galston comments on the fact that many of those who are summoned as jurors appear in a courthouse for the first time, where they find strange surroundings and hear a new language. Many are not familiar with the meanings of those terms which are taken for granted by the legal profession. He states that if the jury system is to be preserved in civil causes, as it must be in the federal system, saving a constitutional amendment, consideration should be given to the desirability of imposing an intelligence test upon those who are summoned as jurors.

Judge Galston refers to the practice in Los Angeles where those summoned for jury duty are given a written test, supplemented by a personal interview, which has resulted in the approval for jury service of a comparatively small percentage of citizens whose names were taken from the general register.

The article also discusses the number of jurors impaneled to try a case and suggests that aside from tradition there is no reason to have twelve.

In conclusion Judge Galston says:

> "Let me preface a final suggestion by stating that I know of no provision of law which compels secrecy concerning the deliberations of a civil petit jury. I am persuaded that if jury-room deliberations could be recorded, transcribed and filed with the verdict, public opinion would realize the hit or miss nature of jury verdicts.

There is no good reason why verdicts should be shrouded in secrecy any more than are the findings by the court sitting without a jury. Such recorded deliberations need not identify by name the juror making any specific remark.

"In all fairness it must be conceded that the uncertainties of trial by jury in part at least are inherent in law itself; for law, like all other so-called social sciences, is not a science. But to admit the uncertainties affords the strongest reason for seeking to control them."

Secretary's Office Wants Bar Publications

The Secretary's office of the Colorado Bar Association is extremely anxious to have a complete file of all publications issued by bar associations in the State of Colorado. We have missing from our files certain issues of DICTA and we would appreciate it if anyone who has copies of the following issues of DICTA would get in touch with the office of the Secretary at 812 Equitable Building, Denver, Colorado, MAin 6273.

Missing numbers of DICTA:

1921 through 1928—all numbers.

1929—March, April, June, August, September, November and December.

1930—March, April, May, June, August, September and October.

1934—May, July, September.

1935—September, October and December.

1936—January, April, May, July, August, September, October, November and December.

1937—August, September, October, November.

1938—January, February, March, July, August, September, October, November and December.

1940—March.

1941—May.

In addition to the missing numbers of DICTA, the Secretary's office would like to have copies issued by the Colorado Bar Association of the report of the Juvenile courts and copies of any publications issued by any local bar associations.

Troubleshooter

The Story of a Northwoods Prosecutor, by Robert Travers, Viking Press, $2.75.

Troubleshooter is a book that "Big City" lawyers will read with wishful longings; that is, all "Big City" lawyers except those residing in Chicago—that city with an "utter lack of personality"—because they probably will be somewhat annoyed in their complacency by Mr. Travers' "profound pity for people who had to live in any large city"—especially Chicago.

Troubleshooter is a book that the "country" lawyer will read with earthy enjoyment. He will see in it some of the people with whom he comes in contact every day. He'll recognize pro-types of some of his clients, and see resemblances to some of the persons that he talked with when he was in the district attorney's office (for what country lawyer hasn't been a district attorney or an assistant district attorney some time in his career?). The country lawyer will understand Travers' longing to return to "the hills and woods, the lakes and streams and swamps; the rocks and moss and matted leaves, the doze and murmur and measured pulse of my small town."

So Travers' story is one that will appeal to all lawyers—incidentally to all who like a tale well told—for it is a story of a small town lawyer, who likes nothing better than to be a small town lawyer. It concerns itself mainly with his experiences in the district attorney's office, first as an assistant and then as the head man. In this book is paraded the varied stories of the culprits who came before the bar of justice.

These stories are, for the greater part, well and vigorously told, and there are incidents which reveal some of the mistakes of any trial lawyer and point out pitfalls which could have been avoided.

If it were not for the fact that the word "human" has been grossly overused, we could use that adjective to describe this book; for it is a collection of human experiences, especially those of the "humorous, mirthful and passionate Finns" who reside in the upper peninsula of Michigan. In any event, for a pleasant evening of vicarious enjoyment among the people of the upper peninsula, we recommend *Troubleshooter*.

WM. H. ROBINSON, JR.

Pre-Trial System of Nineteenth Century Described in Letter

Essex County, Massachusetts, lawyers in the early part of the nineteenth century were using a pre-trial system of their own, as is shown in correspondence of the noted Massachusetts jurist, Samuel Putnam.

In a letter of Judge Putnam's, reprinted from an historical society pamphlet in the MASSACHUSETTS LAW QUARTERLY, the pre-trial procedure of those days was described as follows:

> "The habit of that Bar was to disclose freely to the adverse counsel the points which were to be controverted or admitted, *whereby much expense to clients was saved.* What out of court was agreed to be admitted was always admitted on trial, and so much expense and trouble of witnesses was prevented. No traps were set. But the debatable ground was maintained with as much earnestness as was consistent with good breeding. * * * Those agreements were uniformly verbal, but always performed."

Denver Bar to Elect New Officers

Officers of the Denver Bar Association for the coming year will be elected at the next meeting of the association on May 3rd. Designations of the nominating committee are the following:

For President	Thomas Keely
For First Vice-President	Jean Breitenstein
For Second Vice-President	John Gorsuch
For Trustees	Golding Fairfield Edwin J. Wittelshofer

LOST, STRAYED OR STOLEN

Volume 16 of the Colorado Appeals Reports is unaccountably missing from the library of Division I of the District Court, and no one seems to know just how long it has been gone. So please look for it in your library. Judge Steele would like to have it back and promises that no questions will be asked.

James H. Hunter

James H. Hunter of 175 South Emerson Street, Denver, Colorado, librarian and crier for the United States Circuit Court of Appeals in Denver, died in St. Luke's Hospital in Denver, on April 21, 1943, after a brief illness. He was 84 years of age.

Mr. Hunter was born in Scotland in 1858, and came to the United States when he was 10. He moved to Murphysboro, Illinois, and there married Miss Sarah Wild in September, 1879. He came to Denver in 1886, and worked for the Colorado Midland Railway, later becoming yardmaster in Aspen. He was employed by the Denver Tramway Company as a motorman in 1889, and resigned in 1914 to become superintendent of the zoo, which position he held until 1923. He then became a deputy United States marshal and was later a bailiff of the United States District Court in Denver. In 1931 he was appointed crier for the Circuit Court of Appeals and assumed the duties of librarian for that court in 1937.

Surviving are his wife, Sarah, a son, James W. Hunter, two daughters, Mrs. Harry F. Chrysler and Mrs. David B. Sauve, a sister, Mrs. L. R. Greiner, and several grandchildren.

Mr. Hunter was well known in Denver, and has been a familiar figure in the federal court rooms for many years. His passing leaves a vacant space in the hearts of many of us.

"All politics is the rivalry of organized minorities; the voters are bleacher athletes who cheer the victors and jeer the defeated, but do not otherwise contribute to the result."—WILL DURANT.

One Hundred Years Ago

The following items appeared in the New York *Tribune* of April 5, 1843:

HON. DANIEL WEBSTER arrived in this city yesterday, and took lodgings at the Astor House.

THE LEGISLATURE OF MAINE at its recent session passed a law declaring that every person of good moral character might practice law in the state.

THE PEITHOLOGIAN SOCIETY OF COLUMBIA COLLEGE held their thirty-seventh anniversary this evening at Niblo's saloon.

—Submitted by FRANK L. FETZER.

Lawyer Population and Judicial Salaries

According to G. Dexter Blount, a committee of American Bar Association has recently issued statistics with reference to the lawyer population of the United States and the several states, and salaries paid to Supreme Court Justices. They contain the following information based upon the United States Census of 1940:

In the United States there were 179,544 lawyers, or one lawyer for each group of 733 residents. In Colorado there were 1,454 lawyers, or one lawyer for each group of 772 persons. Colorado ranked 17th among the states in the ratio of population to each lawyer. Alabama ranked last, with one lawyer to 1,731 persons.

In the fifteen largest cities in the United States the average was one lawyer to each group of 398 residents. These cities ranged from one lawyer to 137 residents in Washington, D. C., to one lawyer to 885 in Cleveland, Ohio.

Other interesting facts disclosed are that Colorado, which paid each Justice of the Supreme Court a salary of $6,500, ranked 40th among the states in the size of the salaries paid to Justices. The 48th is South Dakota, which paid $4,800. The top ranking state is New York, which paid $22,500. All states bordering on Colorado except Kansas and Utah paid higher salaries to their Justices than did Colorado.